doi: 10.5102/rdi.v15i2.5355

Hardening *soft law*: are the emerging corporate social disclosure laws capable of generating substantive compliance with human rights?*

Endurecimento do *soft law*: as leis emergentes de divulgação social corporativa são capazes de gerar uma conformidade substancial com os direitos humanos?

Justine Nolan**

Abstract

The aim of this paper is to examine the potential effectiveness and limitations of the emerging corporate social disclosure laws that aim to increase transparency about human rights risks in global supply chains. Globalization has led to the emergence of low cost, efficient (but risky) supply chains that span multiple sourcing countries which exhibit a wide range of economic, political, social, labor and environmental standards. The five laws examined seek to provide mechanisms that aim to reduce the negative human rights impact of business in supply chains. They introduce varying demands on business to map, track and disclose how and where their products are being made. This paper first briefly highlights the preponderance of soft law that defines the business and human rights regulatory framework and guides corporate behavior. It then examines three mandated disclosure laws, the Dodd-Frank Act, the California Transparency in Supply Chains Act and the UK Modern Slavery Act and two due diligence focused laws, the Australian Illegal Logging Prohibition Act and the French Duty of Corporate Vigilance Law. After which, it proposes criteria to strengthen the development and implementation of these laws. It concludes by noting that while these laws are hardening the human rights expectations of business, for them to generate substantive (and not just procedural) human rights compliance they must include: detailed requirements on reporting and due diligence; collaboration with external stakeholders; and compliance mechanisms. Through analysis of these regulatory developments this paper seeks to provide greater understanding of how to shape regulatory responses to governance gaps in transnational supply chains.

Keywords: Business. Human rights. Modern slavery. Disclosure. Due diligence. Transparency.

* Recebido em 14/06/2018
Aprovado em 12/07/2018

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Resumo

O objetivo deste artigo é examinar a potencial eficácia e limitações das leis emergentes de divulgação social corporativa que visam aumentar a transparência sobre os riscos de direitos humanos nas cadeias de fornecimento globais. A globalização levou ao surgimento de cadeias de suprimentos eficientes, mas de baixo custo, que abrangem múltiplos países fornecedores que exibem uma ampla gama de padrões econômicos, políticos, sociais, trabalhistas e ambientais. As cinco leis examinadas procuram fornecer mecanismos que visam reduzir o impacto negativo dos direitos humanos dos negócios nas cadeias de fornecimento. Eles introduzem demandas variadas nas empresas para mapear, rastrear e divulgar como e onde seus produtos estão sendo feitos. Este artigo primeiro destaca brevemente a preponderância da soft law que define a estrutura regulatória dos negócios e dos direitos humanos e orienta o comportamento corporativo. Em seguida, examina três leis de divulgação obrigatórias, a Lei Dodd-Frank, a Lei de Transparência na Cadeia de Suprimentos da Califórnia e a Lei de Escravidão Moderna do Reino Unido e duas leis focadas em devida diligência, a Lei de Proibição de Madeira Legal e o Direito Francês de Vigilância Corporativa. Depois disso, propõe critérios para fortalecer o desenvolvimento e a implementação dessas leis. Conclui-se observando que, embora essas leis estejam endurecendo as expectativas de direitos humanos nos negócios, para que elas gerem conformidade com os direitos humanos substantivos (e não apenas processuais), elas devem incluir: requisitos detalhados sobre relatórios e *due diligence*; colaboração com partes interessadas externas; e mecanismos de conformidade. Por meio da análise desses desenvolvimentos regulatórios, este documento busca fornecer uma compreensão maior de como moldar as respostas regulatórias às lacunas de governança nas cadeias de fornecimento transnacionais.

Palavras-chave: Negócios. Direitos humanos. Escravidão moderna. Revelação. Devida diligencia. Transparência.

tiplicity of countries with varying economic, political, social, labor and environmental standards. Increasing attention is being paid to the potential negative impacts corporate operations may have on the rights of workers in these global supply chains. This heightened attention has led, in part, to increased consideration of how such negative impacts can best be prevented and addressed and raises questions about the appropriate regulatory roles that should be assigned to government, business and/or civil society.

The application of human rights to corporate operations has long depended on the slow and steady evolution of voluntary initiatives that seek to garner corporate compliance with international human rights standards. The implementation and monitoring of such initiatives has largely relied on self-regulation by business, alongside the coercive voice of civil society. Writing in 2008, then United Nations (UN) Special Representative for Business and Human Rights noted that 'the root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences.'[2] That is, corporations often operate in countries that do not have the capacity or will to protect the rights of those within their jurisdiction; as a result, their activities are difficult to monitor and regulate, and wrongs often remain without redress. In response, civil society has often taken the lead in encouraging, coercing and often shaming corporations to address their impact on human rights.

The relatively recent development of state-based legislative initiatives that focus on generating greater transparency in supply chains (and sometimes requiring companies to conduct due diligence) is starting to change this dynamic and hardening human rights requirements for business. What is less clear, is whether such disclosure and due diligence requirements are capable of linking transparency with accountability and generating substantive (not just procedural) human rights compliance.

1. Introduction

Global supply chains now 'account for more than 450 million jobs worldwide'[1] and are present in a mul-

1 G20 MINISTERIAL DECLARATION. *Towards an inclusive future*: shaping the world of work: G20 labor and employment ministers meeting. 2017. Available in: <http://www.g20.utoronto.ca/2017/170519-labour.html>.

2 HUMAN RIGHTS COUNCIL. *Protect, respect and remedy*: a framework for business and human rights: report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. 2008. Available in: <http://www.refworld.org/docid/484d2d5f2.html>.

Over the last 30 years, there has been an emphasis on the development of 'soft law' aimed at regulating the impact of business practices on human rights, for instance, through multi-stakeholder initiatives, institutional declarations or guidelines, or industry codes of conduct.[3] What this aims to do in practice is to harness the power of business to positively impact human rights by providing frameworks and guidance that assist companies in understanding what constitutes responsible business conduct. The utility of these initiatives has not been so much their ability to act as a tool of legal accountability but rather, to engage with companies and enable them to better understand the contemporary responsibilities of business with respect to human rights. The 'rules' for guiding responsible business conduct (such as they exist) have been sourced not only from codified law (generally jurisdictionally confined, such as domestic health and safety laws) but also stem from sources as diverse as privately drafted codes of conduct to internationally formulated guiding principles - so-called soft law standards that help guide corporate respect for human rights. Regulation in this context 'goes beyond legal rules and mechanisms and also comprises political, social, economic and psychological pressures.'[4] The adoption by the UN Human Rights Council in 2011 of the Guiding Principles on Business and Human Rights,[5] firmly entrenched the concept of a corporate responsibility to respect human rights.[6] This responsibility stems from a social expectation (not legal obligation) to respect human rights and soft nature of this responsibility is reflected in the recommendatory nature of the language employed.[7] The Guiding Principles embody an approach which employs a mix of soft and hard law (with the latter reserved for the state duty component) to encourage respect for human rights. Stevelman argues that they are based on a complementary 'synthesis of hard and soft law – the soft law mandates pick up on the space left by voids in hard law, and support and amplify the tents of hard law where they do overlap.'[8]

During this period of the ongoing development of the business and human rights framework, the potential regulatory role of government has at times appeared to be subservient to that of the regulatory power of civil society or the self-regulatory role of business in seeking compliance with human rights.[9] While it remains the

3 RATNER, S. Corporations and human rights: a theory of legal responsibility. *Yale Law Journal*, v. 111, 2001-2002; KINLEY, D.; TADAKI, J. From talk to walk: the emergence of human rights responsibilities for corporations at international law. *Virginia Journal of International Law*, v. 44, n. 4, 2004; UTTING, P. *Rethinking business regulation*: from self-regulation to social control. 2005. Available in: <http://www.unrisd.org/unrisd/website/document.nsf/462fc27bd1fce00880256b4a0060d2af/f02ac3db0ed406e0c12570a10029bec8/$FILE/utting.pdf>.

4 CHARLESWORTH, H. A regulatory perspective on the international human rights system. In: DRAHOS, P. *Regulatory theory:* foundations and applications. Australia: ANU Press, Acton ACT, 2017. p.357–374. p. 361.

5 HUMAN RIGHTS COUNCIL. *Guiding principles on business and human rights*: implementing the united nations "protect, respect and remedy" framework. 2011. Available in: <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

6 The Special Representative commented in 2010 that the corporate responsibility to respect rights is a notion that has been gradually emerging and is 'acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility, and now affirmed by the Human Rights Council itself.' RUGGIE, J. *The UN "Protect, Respect and Remedy" framework for business and human rights*. 2010. Available in: <http://198.170.85.29/Ruggie-protect-respect-remedy-framework.pdf>. This stands in contrast to earlier views by economist Milton Friedman who argued that it was a 'fundamental misconception of the character and nature of the free economy' for a corporation to have any concern other than maximization of profit. FRIEDMAN, M. *Capitalism and Freedom*. Chicago: University of Chicago Press, 1962. p.133; HENDERSON, D. *Misguided virtue:* false notions of corporate social responsibility. Institute of Public Affairs. 2001. p. 147. Available in: <https://iea.org.uk/publications/research/misguided-virtue-false-notions-of-corporate-social-responsibility>. p.147.

7 For example, Guiding Principle No. 13 ("The responsibility to respect human rights requires that business enterprises: ... (b) *Seek to* prevent or mitigate adverse human rights impacts"); Guiding Principle No. 23 ("In all contexts, business enterprises *should*: ... (b) *Seek* ways to honour the principles of internationally recognized human rights when faced with conflicting requirements"), Guiding Principles n5.

8 STEVELMAN, F. Global finance, multinationals and human rights: with commentary on backer's critique of the 2008 report by John Ruggie. *Santa Clara Journal of International Law,* v. 9, n. 1, p. 101-145, 2011. p. 116. For an overview of the challenges of utilizing private regulation and soft law in this field see: LOCKE, R. *The promise and limits of private power*. Cambridge: Cambridge University Press, 2013; SOBCZAK, A. Are codes of conduct in global supply chains really voluntary: from soft law regulation of labour relations to consumer law. *Business Ethics Quarterly,* v. 16, n. 2, p. 167-184, 2006; PARIOTTI, E. International soft law, human rights and non-state actors: towards the accountability of transnational corporations? *Hum Rights, v.* 10, p.139–155, 2009; BACCARO, L.; MELE, V. For Lack of Anything Better? International Organizations and Global Corporate Codes. *Public Administration*, v. 89, n. 2, p. 451–470, 2011; DEVA, S. *Regulating corporate human rights violations*. London: Routledge, 2012; and CRAGG, W. *Business and human rights*: a principle and value-based analysis. 2012. Available in: <https://www.researchgate.net/publication/290790009_Business_and_Human_Rights_A_Principle_and_Value-Based_Analysis>.

9 LOCKE, R. *The promise and limits of private power*. Cambridge: Cambridge University Press, 2013.

primary duty of government to protect human rights (including protecting individuals from harm by third parties such as corporations), the unwillingness and/or inability of many governments to fulfil their human rights obligations has led to protection gaps that critically impact workers in supply chains.[10] However, the development of recent corporate disclosure laws (such as the United Kingdom's (UK) 2015 Modern Slavery Act) and due diligence requirements (such as the French Corporate Duty of Vigilance Law[11]) focused on supply chains, has reignited interest in the complementary regulatory role of government in this field. Such laws are hardening responsible business conduct principles, that have more traditionally been cast in a soft format. At a meeting of the G20 group of countries in 2017,[12] there was clear acknowledgement that it is the responsibility of governments to 'communicate clearly on what we [government] expect from businesses with respect to responsible business conduct'.[13]

This article provides an overview of some of the recent corporate social disclosure and due diligence legislative initiatives aimed at increasing transparency in global supply chains. The article distinguishes between those laws that focus purely on disclosure and those that include an explicit requirement of due diligence and a state-based compliance mechanism. It illustrates how these laws are (to varying extents) hardening the human rights expectations of business that have previously and predominantly been set out in soft law frameworks. This article first examines three mandated disclosure laws (the United States' (US) Dodd-Frank Act, the California Transparency in Supply Chains Act and the UK's Modern Slavery Act) and two laws that expressly incorporate a due diligence requirement alongside their mandated social disclosures (the Australian Illegal Logging Prohibition Act and the French Duty of Corporate Vigilance Law). The first three laws have been selected because they are the first three major laws to adopt this approach and deliberately target corporate social disclosure as a mechanism to improve the transparency of corporate human rights impacts in global supply chains. The last two laws are examined to highlight their due diligence component and considers the distinction between this approach versus simple disclosures. The article then turns to examine what corporate social disclosure and human rights due diligence laws *should* include in order to be an effective tool that will assist in preventing corporate human rights abuses. It questions whether some of the current legislative trends are focused more on promoting procedural disclosure and as such, may not significantly contribute to long term substantive human rights improvement.

2. The emergence of mandated corporate social disclosure and due diligence laws

With the introduction of section 1502 of the Dodd Frank Act in 2010,[14] US policy makers put business on notice that companies need to be more transparent about their sourcing strategies and mandated corporate social disclosure as a means of achieving this. This law creates a reporting requirement for publicly traded companies in the US with products containing specific conflict minerals. The purpose of this provision is to provide greater transparency about how the trade in minerals is potentially fueling and funding the armed struggle in the Democratic Republic of the Congo; functionally, it relies on the adverse reputational impact of such a disclosure rather than mandating penalties for actually sourcing minerals from conflict-afflicted regions.[15] The law was quickly followed by the passage of California's Transparency in Supply Chains Act (CTSCA) in 2010, which came into effect in 2012.[16] The CTSCA requires large retail and manufacturing firms to disclose efforts to eradicate slavery and human trafficking from their supply chains and is another example of mandated corporate social disclosure. The adoption of the UK's

10 2008 Report, n2.

11 *Loi de Vigilance* No. 2017-339 of 2017.

12 The G20 (or Group of Twenty) is an international forum for the governments and central bank governors from 20 major economies (19 countries plus the European Union). See: HAMBURG. *G20 summit 2017*. Available in: <http://www.hamburg.com/g20-2017/>.

13 G20 MINISTERIAL DECLARATION. *Towards an inclusive future*: shaping the world of work: G20 labor and employment ministers meeting. 2017. Available in: <http://www.g20.utoronto.ca/2017/170519-labour.html>.

14 *Dodd Frank Wall Street Reform and Consumer Protection Act*, 2010 Section 1502.

15 Section 1502 does impose penalties for not reporting or complying in good faith. Also, the information filed by companies is subject to s18 of the *Securities Exchange Act* 1934 which attaches liability for any false or misleading statements.

16 BIRKEY, R. et al. Mandated social disclosure: an analysis of the response to the California transparency in supply chains act 2010. *Journal of Business Ethics*, p. 1-15, 2016. Available in: <https://link.springer.com/article/10.1007%2Fs10551-016-3364-7>.

Modern Slavery Act in 2015 focused broader corporate attention on the use of legislative disclosure requirements to address the human rights impacts of business. Section 54 of the Modern Slavery Act requires specified commercial organizations which supply goods or services in the UK to disclose information about their efforts to address modern slavery in their supply chains.[17] The rationale behind these types of reporting requirements is that the reputational implications of forced disclosure will compel companies to undertake human rights focused examination of their supply chain practices.

Each of these three laws is quite specific in its focus, with the Dodd-Frank Act inquiring only about the presence of conflict minerals and the UK and Californian laws focusing on disclosures about modern slavery.[18] The laws only require companies to report on their sourcing and (possibly) their due diligence practices but do not require them to act on their findings or expressly conduct due diligence to facilitate such reporting on corporate souring practices.[19] The assumption in this disclosure model appears to be that the transparency gained from disclosure will incentivize corporate action to address human rights risks, because of the greater visibility of these risks that will be evident to investors and consumers. It relies on the voices of external stakeholders to hold companies to account by assessing and critiquing the corporate reports. The model marks a shift from state regulators' traditional role in overseeing purely financial (as opposed to social) disclosures but shifts the responsibility of regulation to non-state actors.[20]

Initial analysis of the various statements submitted under these laws indicate that, to date, the corporate responses tend to be more symbolic than substantive. For example, in a study by Sarfaty analyzing the first statements issued under section 1502 of the Dodd-Frank Act, she concluded that the reports issued a low level of compliance with the requirements of the law.[21] Even accounting for the fact that this type of social disclosures represents a new learning paradigm for companies, the analysis is revealing of how many companies failed to follow the basic procedural requirements of the transparency provision.

Similarly, early analysis of the CTSCA and the Modern Slavery Act also indicates a tendency toward the production of reports that minimally meet the procedural 'tick the box' requirements of the laws. Year on year analysis of compliance with the CTSCA shows some slight improvement with compliance requirements but still indicates that 48% of companies are not complying with the basic disclosure requirements of the law.[22] Another study concluded that 'analysis of the extensiveness of the disclosure suggests that, overall, the responses tend to be more symbolic than substantive'.[23] Various studies conducted on the corporate statements issued under the Modern Slavery Act also indicate mixed results. While select corporate statements have been praised, more generally the law has engendered a corporate response that falls short of any serious effort to address modern slavery in their supply chains.[24] With both the

17 See Appendix A for more details about these laws.

18 Modern slavery is not defined in international law but is predominantly used as an umbrella term to encompass various forms of coercion that are prohibited in international legal instruments including slavery, forced labor, trafficking in persons and forced marriage. The relevant offences under the United Kingdom's Modern Slavery Act include slavery, servitude, forced or compulsory labor and human trafficking. *Modern Slavery Act* 2015 UK Part 1.

19 Recent litigation in the US has confirmed this approach with specific reference to the CTSCA: *Barber v Nestlé USA Inc* No. 8:2015cv01364 (C.D. Cal. December 14, 2015); *Hodson v Mars, Inc* No 4:2015cv04450 (N.D. Cal, February 17, 2016); *Sud v Costco Wholesale Corporation* No 3:2015cv03783 (N.D. Cal, January 24, 2016).

20 NELSON, A. The materiality of morality: conflict minerals. *Utah Law Review*, p. 291-241, 2014.

21 SARFATY, G. Shining a light on global supply chains. *Harvard International Law Journal*, v. 56, n. 2, p.419-463, 2015. p. 423. Sarfaty's study of the first set of Conflict Minerals Reports submitted to the Securities Exchange Commission up to June 2014 argues that these reports exhibited a low level of compliance with due diligence requirements and identified several obstacles to achieving broader compliance, including that: '(i) international norms on supply chain due diligence are in their infancy; (ii) the proliferation of certification standards and in-region sourcing initiatives are still evolving and often competing; and (iii) inadequate local security and weak governance inhibit the mapping of mineral trade and the tracing of minerals in the region'.

22 BAYER C.; HUDSON, J. *Corporate compliance with the California transparency in supply chains act*: anti-slavery performance in 2016. 2017. p. 5. Available in: <https://static1.squarespace.com/static/5862e332414fb56e15dd20b9/t/58bf06e346c3c478cf76d619/1488914152831/CA-TISCA.v.24_secured.pdf>.

23 BIRKEY, R. et al. Mandated social disclosure: an analysis of the response to the California transparency in supply chains act 2010. *Journal of Business Ethics,* p. 1-15, 2016. Available in: <https://link.springer.com/article/10.1007%2Fs10551-016-3364-7>.

24 BENJAMIN, T.; PURVIS, J. G. Corporate supply chain transparency: California's seminal attempt to discourage forced labour. *The International Journal of Human Rights*, v. 20, n. 1, p. 55-77, 2016; ERGON ASSOCIATES. *Reporting on modern slavery*: the current state of disclosure. 2016. Available in: <http://www.ergonassociates.net/images/stories/articles/ergonmsastatement2.pdf>; CORE COALITION; BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE. *Register of slavery & human trafficking corporate statements re-*

Californian and UK laws there is no central repository where the corporate statements are held, and in the UK there is no official public list detailing which companies need to report. These shortcomings make the job of conducting a comparative analysis of reports more challenging and are not conducive to enabling consumers, investors and civil society more broadly to act as compliance enablers. In addition, the lack of comparably structured statements complicates comparability analysis both within sectors and from year to year.[25] Compliance with the disclosure requirements set out in the Dodd-Frank Act, the CTSCA and the Modern Slavery Act depend largely on the pressure exerted by external parties – consumers, investors, civil society – to induce compliance. As the table in Appendix 1[26] illustrates, these three laws do not build in express penalties in the form of fines or criminal liability for non-compliance, but rather rely on a mix of public and private regulatory techniques to achieve compliance. While research on mandated corporate environmental disclosures (which have been operating in various jurisdictions for a longer time) shows that reporting may improve over time, the development of more substantive responses is influenced by a number of factors, including the potential reputational risk of exposure faced by companies who do not comply with reporting requirements.[27] For this type of regulatory model to be effective, the disclosure requirements should be cast in such a way so that the risk of detection of non-compliance can be more easily uncovered by external stakeholders.

Ultimately, the imposition of these corporate disclosure requirements is part of the larger challenge of determining 'when, how, and why might we expect improvement in the treatment of workers in global supply chains?'[28] The Dodd-Frank Act, the CTSCA and the Modern Slavery Act are three examples of mandated social disclosure laws that appear to draw, in part, on the regulatory theories of responsive regulation[29] and networked governance,[30] which (broadly) argue that regulators should first consider the extent to which business is effective at regulating itself when determining the extent to which a regulator will intervene. The laws seek to draw a compromise between the strong regulation of business on the one hand and deregulation on the other and instead look to optimize a mix of public and private regulation to achieve compliance. In this context, these three laws focus on compliance in a narrow sense of being 'obedient to a regulatory obligation,'[31] with the primary obligation being to report. Compliance may also be considered in a broader sense of acting in a way that will achieve a policy goal, such as eradicating modern slavery. This broader sense of compliance is more readily apparent in the two due diligence laws discussed below which require explicit corporate behavior responses (by conducting due diligence).

Each of the three laws discussed above, incorporate a mix of both hard and soft approaches to addressing human rights risks in supply chains. The mandated transparency requirement hardens expectations around reporting of social issues, but the ambiguity around compliance softens the approach. The role of the government in these regimes is essentially to act as the orchestrator of private actors to encourage compliance and is a move away from the more traditional 'command and control' approach that is more likely to figure in much domestic legislation. However, it is not obvious that this tactic is proving to be effective nor that disclosure alone will guarantee improved outcomes. A 2017 review by the UK Joint Committee on Human Rights on the operation of the Modern Slavery Act reinforces

leased to date to comply with uk modern slavery act 2016.

25 KNOW THE CHAIN. *Five years of the California transparency in supply chains act*. 2015. Available in: <https://knowthechain.org/wp-content/uploads/2015/10/KnowTheChain_InsightsBrief_093015.pdf>.

26 The information in the table in Appendix I is drawn from the laws themselves and also summaries of the laws provided in the following reports: FAIR LABOR ASSOCIATION. *Supply chain traceability and transparency:* shifting industry norms, emerging regulations, and greater interest from civil society. 2017. Available in: <http://www.fairlabor.org/blog/entry/supply-chain-traceability-and-transparency>. and BUSINESS HUMAN RIGHTS AND RESOURCE CENTRE; ITUC CSI IGB. *Modern slavery in company operations and supply chains*: mandatory transparency, mandatory due diligence and public procurement due diligence. 2017. Available in: <https://www.ituc-csi.org/modern-slavery-in-company>.

27 BERTHELOT, S.; CORMIER, D.; MAGNAN, M. Environmental disclosure research: review and synthesis. *Journal of Accounting Literature*, v. 22, p. 1–44, 2003. p. 2.

28 BERLINER, D. et. al. Governing global supply chains: what we know (and don't) about improving labor rights and working conditions. *Annual Review of Law and Social Science,* v. 11, n. 1, p. 193–209, 2015.

29 AYRES, A.; BRAITHWAITE, J. *Responsive regulation:* transcending the deregulation debate. New York: Oxford University Press, 1992.

30 GRABOSKY P. Beyond responsive regulation: the expanding role of non-state actors in the regulatory process. *Regulation and Governance,* v. 7, n. 1, p.114-123, mar. 2013.

31 PARKER, C.; NIELSEN, V. Lehmann. Compliance: 14 questions. In: DRAHOS, P. *Regulatory theory:* foundations and applications. Australia: ANU Press, Acton ACT, 2017. p. 357–374.

this assumption. The Committee cited evidence that 35% of statements under the Modern Slavery Act did not discuss risk assessment processes, and two thirds of statements did not identify priority risks.[32] Rather, most companies were simply disclosing general information about their existing policies.[33] Ultimately, the Joint Committee recommended the introduction of legislation mandating human rights due diligence as a means of hardening compliance with human rights expectations.[34]

Due diligence is a concept that is gaining traction in the business and human rights field. Human rights due diligence is an integral component of the Guiding Principles and its effective development and implementation is noted as a shared responsibility of both government and business. Government action to encourage companies to respect human rights should include providing clarity around concepts such as due diligence and setting standards for communicating these efforts to the broader community. The concept of due diligence was introduced in the Guiding Principles as a mechanism by which companies might discharge their responsibility to respect rights and reflects the continued reliance on, what had been to date (as at and prior to 2011, when the principles were introduced), a largely self-regulatory process to address corporate human rights violations. Human rights due diligence, as set out in the Guiding Principles, is basically comprised of four key elements. Namely, businesses are expected to: (1) assess their actual and potential adverse human rights impacts; (2) integrate these findings internally and take appropriate preventative and mitigating action; (3) track the effectiveness of their response; and (4) publicly communicate how they are addressing their human rights impacts.[35] Guiding Principle 17 sets out the basic parameters of the recommended due diligence process and notes that human rights due diligence may cover impacts a business causes, contributes or is directly linked to it via its operations and relationships, and will vary in complexity according to the size of the business and the severity of risk.[36]

A key feature that distinguishes human rights due diligence from traditional corporate due diligence, is its ongoing nature and that it focuses primarily on detecting the risks that the company may impose on others, as opposed to risks to the company.[37] While due diligence as set out in the Guiding Principles applies to a range of situations in which businesses may potentially impact human rights, one of the most common (and significant) human rights challenges faced by business today is that associated with its reliance on global supply chains. However, none of the three supply chain regulatory approaches analyzed above that mandate social disclosures expressly impose a legal obligation on companies to conduct such due diligence.

Since the advent of the Guiding Principles in 2011, there have been significant advances in further defining and refining the concept of due diligence, and in some instances (discussed below), legally mandating companies to conduct such assessments. Recently, detailed guidance has begun to emerge (developed by both state and non-state actors) which attempts to outline what a comprehensive supply chain due diligence program should look like. The OECD's work in this area has been ongoing for many years and its most recent guidance documents reflect and expand on the framework set out in the Guiding Principles. [38] The Dutch Agreement on Sustainable Garment and Textile, established in 2016, is an example of a sector specific soft law ap-

32 ERGON ASSOCIATES. *Reporting on modern slavery*: the current state of disclosure. 2016. Available in: <http://www.ergonassociates.net/images/stories/articles/ergonmsastatement2.pdf>. HOUSE OF LORDS, HOUSE OF COMMONS JOINT COMMITTEE ON HUMAN RIGHTS. *Human rights and business 2017:* promoting responsibility and ensuring accountability. p.37-38. Available in: <https://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>.

33 Written evidence from the Equality and Human Rights Commission in the UK Joint Committee Report, n32, p38.

34 UK Joint Committee Report, n32, p59.

35 Guiding Principles n5, Principle 15(b), 17-21

36 Guiding Principles n5, Principle 17.

37 MCCORQUODALE, R.; BONNITCHA, J. The concept of "Due Diligence" in the UN guiding principles on business and human rights. *European Journal of International Law,* v. 28, 2017.

38 The OECD has been particularly active in this space and has produced a 2018 report on responsible business conduct along with sector specific guidelines. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. *Due diligence guidance for responsible business conduct OECD publishing*. 2018. Available in: <http://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. *Due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas*. 2016. Available in: <http://dx.doi.org/10.1787/9789264252479-en>; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. *Due diligence guidance for responsible supply chains in the garment and footwear sector*. 2017. Available in: <https://mneguidelines.oecd.org/oecd-due-diligence-guidance-garment-footwear.pdf>.

proach to facilitating human rights due diligence. [39] It is a sector-based agreement between sector associations, member companies, government, trade unions and civil society organizations by which they work together to identify and address risks to human rights (including labor rights), environmental impacts, impacts related to corruption and taxation practices and other negative impacts covered by the OECD Guidelines for Multinational Enterprises and the Guiding Principles. Through policies such as this, the Dutch government aims to encourage the implementation of due diligence on a voluntary basis. To date, two agreements have been reached, one in the garment and textile sector and the other in banking. Alongside these high level governmental and inter-governmental led efforts to encourage voluntary due diligence are guidelines that have been developed by civil society to further define and refine human rights due diligence.[40]

However, despite the proliferation of discussions on due diligence, its practical implementation appears limited. A 2017 report by the Corporate Human Rights Benchmark reported low levels of due diligence practice and reporting. [41] Similarly, a survey conducted by Norton Rose Fulbright and the British Institute of International and Comparative Law[42] found that over 50% of companies surveyed had never undertaken a specific human rights due diligence process, These initial results indicate that six to seven years since the adoption of the Guiding Principles, a majority of companies are either not conducting or adequately reporting on their human rights due diligence practices.

This lack of progress might be attributed in part to the non-binding nature of due diligence requirements at both the international and domestic level, however some recent legislative initiatives are seeking to change that. The two laws, described in Appendix 1, that expressly focus on due diligence as a tool to drive compliance with social norms are the Illegal Logging Prohibition Act of 2012 from Australia and the French Corporate Duty of Vigilance Law of 2017. The Illegal Logging Prohibition Act incorporates due diligence requirements that obligate the importers and processors of timber into Australia to initiate verification and certification processes aimed at ensuring the imported timber had not been illegally logged.[43] If an importer or processor intentionally, knowingly, or recklessly imports or processes illegally logged timber, they could face significant penalties, including up to five years imprisonment and/ or heavy fines, however the criminal penalties do not apply to non-compliance with the due diligence requirements. The regulations attached to the Act provide clear guidance as to what will constitute compliance with the due diligence requirements. [44]

39 SOCIAAL-ECONOMISCHE RAAD. *Agreement on Sustainable Garment and Textile*. Available in: <http://www.indianet.nl/pdf/AgreementOnSustainableGarmentAndTextile.pdf>; SOCIAAL-ECONOMISCHE RAAD. *Dutch Banking sector agreement on international responsible business conduct regarding human rights*. 2016. Available in: <https://www.ser.nl/~/media/files/internet/publicaties/overige/2010_2019/2016/dutch-banking-sector-agreement.ashx>.

40 For example, the Ethical Trading Initiative has developed a Human Rights Due Diligence Framework, the Danish Institute for Human Rights has its Human Rights Impact and Assessment Guidance and Toolbox, and Shift has also developed guidance around due diligence. See: DANISH INSTITUTE FOR HUMAN RIGHTS. *Human Rights Impact and Assessment Guidance and Toolbox*. Available in: <https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/business/hria_toolbox/introduction/welcome_and_introduction_final_may2016.pdf_223791_1_1.pdf>.; SHIFT. *Respecting human rights through global supply chains shift workshop report n. 2*. 2012. Available in: <https://www.shiftproject.org/media/resources/docs/Shift_UNGPssupplychain2012.pdf>.

41 Its 2017 report tracking the performance of 98 publicly traded companies in the agricultural products, apparel and extractives sectors found that only one-third of companies had attempted to identify their human rights risks, 20% had integrated and acted on those risks, 18% had tracked the effectiveness of those risks and only 2% of companies had publicly communicated their effectiveness. CORPORATE HUMAN RIGHTS BENCHMARK. *Key Findings 2017*. 2017. Available in: <https://www.corporatebenchmark.org/>. The report tracks the performance of 98 publicly traded companies in the agricultural products, apparel, and extractives sectors. Companies are chosen on the basis of size, revenues, geographic and industry balance. The CHRB has a long-term goal of eventually assessing the top 500 global companies: CORPORATE HUMAN RIGHTS BENCHMARK. *Friends of the CHRB*. Available in: <https://business-humanrights.org/en/corporate-human-rights-benchmark-0/friends-of-the-chrb>.

42 The survey covered 152 companies from a range of sectors. MCCORQUODALE, R. et. al. Human rights due diligence in law and practice: good practices and challenges for business enterprises. *Business and Human Rights Journal,* v. 2, n. 2, p. 195-224, jul. 2017.

43 TURNER, R. J. Transnational supply chain regulation: extra-territorial regulation as corporate law's new frontier. *Melbourne Journal of International Law*, v. 17, n. 1, p.188-209, 2016.

44 The *Illegal Logging Prohibition Amendment Regulation* 2012 provides that: step 1 is information gathering (the importer must obtain as much of the prescribed information as is reasonably practicable); step 2 is an option process that involves assessing and identifying risk against a prescribed timber legality framework (section 11) or a country-specific guideline (once they are prescribed); step 3 is risk assessment (section 13); and, step 4 is risk mitigation (section 14), which should be adequate and proportionate to the identified risk. Illegally logged timber is defined broadly in the *Illegal Logging Prohibition Act* 2012 (Cth) as timber 'harvested in contravention of laws in force in the place (whether or not in Australia) where the timber was

While narrowly targeted on a single sector, the Act has both an environmental and human rights focus as the impacts of illegally logged timber can be widespread.[45]

The French Corporate Duty of Vigilance Law is much broader in scope (in that it applies to all human rights) but narrower in its application (it will apply to France's largest companies as determined by the number of employees). It also incorporates human rights due diligence as a key mechanism for improving respect for human right in supply chains. The broad purpose of the law is to require relevant businesses to identify risks and prevent serious violations of human rights and fundamental freedoms to better protect the health and safety of both people and the environment. As noted in Appendix 1, the law sets out the broad parameters of what adequate due diligence should look like and includes compliance mechanisms that incorporate potential regulatory roles for both public and private actors.

While the Australian and French laws also incorporate social disclosure requirements there are two key distinctions between these due diligence focused laws and the three mandated social disclosure laws discussed above. Firstly, the Australian and French laws recognize that disclosure alone is likely to be insufficient to drive improved respect for human rights in supply chains. While transparency is part of what the laws require, they also focus on the substantive actions business entities must take to understand and address human rights risks. That is, they require companies to conduct due diligence, and in so doing, develop plans and engage in detailed risk identification, assessment and mitigation. Secondly, both laws include mechanisms that go beyond primarily relying on naming and shaming tactics from private actors to drive compliance. Not to say such tactics are not useful, but rather that alone, they are likely to be insufficient. As noted by Charlesworth 'the idea of responsive regulation—first developed in the context of business regulation—is [that it is] built on pyramids of supports and pyramids of sanctions.'[46] And indeed, Ayres and Braithwaite when developing their responsive regulatory theory, argued that '[r]egulatory agencies will be able to speak more softly when they are perceived as carrying big sticks.'[47] What is missing from the three social disclosure laws discussed above, is the stick. Mechanisms to encourage corporate compliance with human rights may be offered both in the form of positive inducements (such as compliance being a necessary qualification for public procurement contracts) and negative deterrents (such as fines or criminal liability). Given the low levels of compliance seen so far in relation to the Dodd-Frank Act, the CTSCA and the Modern Slavery Act, it is arguably necessary for the state to incorporate legal inducements or penalties in their compliance toolbox, alongside mechanisms that facilitate compliance pressure from private actors. Encouragingly, there are a handful of other laws emerging, in some jurisdictions, which also go beyond mandated transparency to include express due diligence requirements and compliance mechanisms, some with a narrow focus such as forced or child labor and others referencing human rights more broadly.[48]

3. Towards substantive compliance with human rights

Mandated transparency coupled with human rights due diligence are essential components of any legislative initiative to regulate human rights impacts in corporate supply chains. However, one should not assume that simply institutionalizing transparency or due dili-

harvested' (Section 7). The due diligence requirements, as outlined in the Illegal Logging Prohibition Regulation 2012, came into effect on 30 November 2014. From 1 January 2018, businesses and individuals may face penalties for failing to comply with the due-diligence requirements. Conducting the requisite due diligence can be used as a defense to negligence.

45 As well as causing environmental harm, illegal logging involves human rights abuses like violence against local communities, forced labor, and pollution of vital water supplies.

46 CHARLESWORTH, H. A regulatory perspective on the international human rights system. In: DRAHOS, P. *Regulatory theory:* foundations and applications. Australia: ANU Press, Acton ACT, 2017. p.357–374. p. 368.

47 AYRES, A.; BRAITHWAITE, J. *Responsive regulation:* transcending the deregulation debate. New York: Oxford University Press, 1992. p. 6.

48 Other legislative measures which require supply chain due diligence include: the US Trade Facilitation Act which allows US Customs to seize imported goods if an importer is unable to provide a certificate proving which measures were taken ensure that the goods were not produced using forced labor. Under the proposed Dutch Child Labour Bill, companies would be required to issue a statement declaring that they have exercised due diligence to prevent their goods and services being made using child labor. BUSINESS HUMAN RIGHTS AND RESOURCE CENTRE; ITUC CSI IGB. *Modern slavery in company operations and supply chains*: mandatory transparency, mandatory due diligence and public procurement due diligence. 2017. p. 15. Available in: <https://www.ituc-csi.org/modern-slavery-in-company>.

gence will automatically lead to improvements in corporate behavior. What is key, is ensuring that the laws encourage a move toward substantive compliance with human rights rather than simply cosmetic compliance.[49] Substantive compliance here is understood to mean actions that are undertaken to satisfy the true objective of the law - for example, practical steps to address and reduce modern slavery in supply chains - rather than simply directing actions toward the objective of increasing transparency about the problem. To do that, and substantively address the risks of modern slavery, these laws must: (1) incorporate clear and detailed guidance on disclosure and due diligence requirements; (2) require collaboration with external stakeholders; and (3) provide for compliance mechanisms to couple transparency and due diligence with accountability.

3.1. Disclosure guidance

Detailed reporting requirements can assist in providing useful information to external stakeholders that allows civil society, potential business partners, investors and the public to evaluate company performance and identify best practice.[50] Providing detailed guidance of what is expected of all companies will also help ensure that those businesses that do disclose in some detail are not punished in the market-place for doing so, as it will 'level the playing field' of disclosure. Detailed information is also necessary to help regulators evaluate whether self-regulation on an issue is working or if some other approach is required. These disclosure requirements must include outcomes, not just processes. The law should include clear guidance for companies on what and how they report to enable the production of consistent and comparable reports that can be measured and improvements tracked over time. The lack of initial guidance provided to UK companies has been a criticism of the Modern Slavery Act.[51] Currently section 54(5) of the Modern Slavery Act outlines what a statement may include, but there is no prescribed form of content or length for a statement. It is suggested that companies report on six broad areas: business and supply chain structure, polices, due diligence, risk assessment, effectiveness and training. These topics for reporting are discretionary. Statements submitted to date lack consistency and many companies are not providing substantive disclosure in most of the suggested areas. Uniform obligatory reporting criteria should be included so that companies do not pick and choose which elements to report against.

An essential element of what companies should be reporting on is their due diligence efforts. Reporting is simply the final step in the process of identify, assessing and addressing risks, and tracking the effectiveness of those responses. For reporting to be legitimate it must be based on effective due diligence. The Guiding Principles provide a broad framework that sets out the general parameters of what companies should take into account in conducting human rights due diligence assessments.[52] They state that the 'process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.'[53] However, the term 'impacts' – the crucial element to which due diligence is addressed – is not defined and it may be clearer to refer to violations of international human rights, the terminology employed in the French law.[54] As a high-level document, the Guiding Principles employs imprecise language and anticipates that human rights due diligence will be further elaborated upon through negotiated standard-setting processes at a more concrete level (for example, on an sector by sector basis as has been done by the OECD). Supply chain arrangements are not static[55] and will vary from sector to sector and as such those laws that are narrowly targeted on a specific sector (such as the Illegal Logging Act) may be able to provide more precision in detailing what due diligence entails. However, the fundamental principles of due diligence (referred to in both the French and Australian Acts) include tracking and reporting on: risk identification, risk assessment and risk mitigation.

49 KRAWIEC, K. D. Cosmetic compliance and the failure of negotiated governance. *Washington University Law Quarterly*, v. 81, p. 487-544, 2003.

50 PARKER, C. *The open corporation:* effective self-regulation and democracy. Cambridge: Cambridge University Press, 2002.

51 ERGON ASSOCIATES. *Reporting on modern slavery*: the current state of disclosure. 2016. Available in: <http://www.ergonassociates.net/images/stories/articles/ergonmsastatement2.pdf>.

52 Guiding Principles, n5 Principles 17-20.

53 Guiding Principles, n n5, Principle 17.

54 *Loi de Vigilance* No. 2017-339 of 2017 Article 1. See also, DEVA, S. Treating human rights lightly: a critique of the consensus rhetoric and the language employed by the guiding principles. In: DEVA, S.; BILCHITZ, D. *Human rights obligations of business:* beyond the corporate responsibility to respect? Cambridge: Cambridge University Press, 2013.

55 GEREFFI, G.; HUMPHREY, J.; STURGEON, T. The governance of global value chains. *Review of International Political Economy*, v. 12, n. 1, p. 78–104, 2005. p. 96.

3.2. Collaboration

General guidance provided by the OECD on due diligence stresses the need for companies to adopt a collaborative approach in their due diligence and reporting efforts. For example, the OECD's Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector emphasizes that due diligence is both an interactive and shared process, noting that enterprises 'should engage meaningfully with affected stakeholders as part of the due diligence process. Such engagement should be two-way, conducted in good faith and responsive.'[56] The OECD advises that business should engage with other companies in the sector, relevant multi-stakeholder institutions and directly with workers and their chosen representatives such as trade unions.[57] This broad concept of collaboration is distinct from social auditing, a process by which a company verifies supplier compliance with human rights standards, typically set out in a code of conduct. While the precise nature of a social audit will vary depending on the industry in question and the organisation undertaking the audit, it generally involves a physical inspection of a facility (for example a factory, farm, mine or vessel), combined with a review of documents (to the extent that records are kept) and some interviews with management and employees. [58] Social auditing may sometimes be a useful tool to identify non-compliance with human rights, and as such, a component, rather than the focal point of human rights due diligence. However sole reliance on social auditing to satisfy legal requirements reflects a limited vision of supply chain human rights due diligence.[59] Broader and ongoing collaboration with external stakeholders on the other hand, allows for an external check to ensure that the systems that are being implemented will be effective as they can provide input into the design and implementation of those systems.[60] Companies may lead, but cannot complete the task of undertaking substantive human rights due diligence in isolation.

3.3. Compliance

Theoretically, it is realistic to assume that without any mechanism to encourage compliance with the legal requirements of transparency and due diligence, the uptake by companies may be limited.[61] This has played out in practice via the implementation of the Modern Slavery Act in the UK. The review of the operation of the law by the UK Joint Committee on Human Rights in 2017 suggested not only the inclusion of mandatory due diligence to strengthen the current reporting requirements, but also the introduction of civil (and criminal) penalties where human rights violations have occurred.[62] Both the French and the Australian due diligence laws provide for the imposition of civil penalties where companies have failed to implement due diligence plans. Compliance here is not linked simply to

56 OECD Apparel Guidance, n38 p.23.

57 OECD Apparel Guidance, n38 p.24-26.

58 See for example, ISEAL ALLIANCE. *Assuring compliance with social and environmental standards:* code of good practice. p. 5. Available in: <https://www.isealalliance.org/online-community/resources/assurance-code-version-10>. (ISEAL Alliance Code of Good Practice). The ISEAL Alliance is a multi-stakeholder initiative whose aim is to strengthen the sustainability standards of MSIs (and other standard setting and accreditation bodies

59 There is now a growing body of evidence indicating that social auditing is, in and of itself, an ineffective tool for achieving meaningful and consistent human rights improvements. REINECKE, J.; DONAGHEY, J. The 'Accord for Fire and Building Safety in Bangladesh'"in response to the Rana Plaza disaster. In: MARX, A. et. al. (Ed.). *Global governance of labour rights:* assessing the effectiveness of transnational public and private policy initiatives. New York: Edward Elgar Publishing, 2015; LOCKE, R.; AMENGUAL, M.; MANGLA, A. Virtue out of necessity? Compliance, Commitment, and the Improvement of Labor Conditions in Global Supply Chains. *Politics & Society*, v. 37, n. 3, 2009; O'ROURKE, D. Multi-stakeholder regulation: privatizing or socializing global labor standards? *World Development*, v. 34, n. 5, p. 899-907, 2006; CLEAN CLOTHES CAMPAIGN. *Looking for a quick fix*: how weak social auditing is keeping workers in sweatshops. 2005. p. 26-28, 32-39. Available in: <https://cleanclothes.org/resources/publications/05-quick-fix.pdf/view>.; LEBARON, G.; LISTER, J. *Speri Global Political Economy Brief n. 1*: ethical audits and the supply chains of Global Corporations. 2016. Available in: <http://speri.dept.shef.ac.uk/wp-content/uploads/2016/01/Global-Brief-1-Ethical-Audits-and-the-Supply-Chains-of-Global-Corporations.pdf>; INTERNATIONAL LABOUR ORGANIZATION. *Fishers first*: good practices to end labour exploitation at sea. 2016. Available in: <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_515365.pdf>

60 GUNNINGHAM, G.; GRABOSKY, P. *Smart regulation:* designing environmental policy. New York: Oxford Clarendon Press, 1998. p. 247.

61 Regulatory theory assumes the necessary inclusion of a gradation of mechanisms, ranging from self-regulation to external enforcement by the state, may be necessary in order for regulation to be effective, see AYRES, A.; BRAITHWAITE, J. *Responsive regulation:* transcending the deregulation debate. New York: Oxford University Press, 1992.

62 HOUSE OF LORDS, HOUSE OF COMMONS JOINT COMMITTEE ON HUMAN RIGHTS. *Human rights and business 2017:* promoting responsibility and ensuring accountability. p. 37-38. p. 22. Available in: <https://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>.

a failure to report, but a failure to implement. Such laws could (as in the case of the Australian law) provide that demonstrated good faith due diligence could be raised as a defence to, or at least a proportional mitigation of liability.[63] Guidance in this respect could be obtained from various anti-bribery and corruption laws that have been implemented both nationally and internationally. The UK Bribery Act 2010, for example, takes into account the fact that companies implemented 'adequate procedures' to prevent bribery in their operations as a defence to a charge of a company's failure to prevent bribery.[64] Provisions incorporating both penalties for, and defences to, alleged misconduct could give business a strong incentive to exercise due diligence, without depriving them of the ability to defend themselves, or depriving victims of a remedy for serious violations of human rights.[65] Compliance mechanisms could also be offered in a way by the state that motivates corporate compliance, so that reporting and due diligence requirements must be met as a condition of tendering for any public procurement contracts. Transparency and due diligence must be coupled with accountability in order to make the process meaningful.

4. Conclusion

The emergence of news laws to address the human rights risks in global supply chains provide a real opportunity to develop robust reporting and human rights due diligence standards that are capable of effecting positive change. The establishment of such legal standards is challenging in that it involves the necessary involvement of a multiplicity of stakeholders and implementation across borders. However, such laws can and should build on the slow and steady evolution of soft law that has been used to guide, cajole and sometimes coerce companies to respect human rights in their supply chains. Whether in the form of multi-stakeholder codes of conduct or high-level institutional guidelines, there is an emerging consensus of what companies must do to respect human rights. These emerging reporting and due diligence legal requirements provide an opportunity to entrench those norms to ensure compliance is widespread. In developing laws to address supply chain risks, consideration should be given to ensuring that the reporting framework requires due diligence to be conducted, encourages collaboration with a variety of stakeholders and incorporates compliance mechanisms so that the efforts taken to address human rights risks are substantive rather than those that might engender a more process oriented cosmetic form of compliance with human rights.

63 MICHALOWSKI, S. Due diligence and complicity: a relationship in need of clarification. In: DEVA, S.; BILCHITZ, D. *Human rights obligations of business:* beyond the corporate responsibility to respect? Cambridge: Cambridge University Press, 2013. p. 218-242.

64 CASSEL, D.; RAMASASTRY, A. *White paper*: options for a treaty on business and human rights. 2015. p. 99. Available in: <https://scholarship.law.nd.edu/ndjicl/vol6/iss1/4/>. Also, courts and the US Department of Justice take certain factors into consideration when assessing criminal fines for companies prosecuted under the U.S. Foreign Corrupt Practices Act including: whether high-level personnel were involved in or condoned the conduct, whether the organization had a pre-existing compliance and ethics program, voluntary disclosure, cooperation, and acceptance of responsibility.

65 CASSEL, D.; RAMASASTRY, A. *White paper*: options for a treaty on business and human rights. 2015. p. 99. Available in: <https://scholarship.law.nd.edu/ndjicl/vol6/iss1/4/>.

Appendix A – Social Disclosure and Due Diligence Laws

Type of law	Disclosure (& implied due diligence)	Disclosure	Due Diligence + Civil Liability (fine)	Disclosure	Due diligence + Civil liability (fines + vulnerability to civil litigation)
Law	US Dodd Frank Wall Street Reform and Consumer Protection Act, 2010 Section 1502	California Transparency in Supply Chains Act, 2010	Australia Illegal Logging Prohibition Act 2012	UK Modern Slavery Act, 2015 Section 54	France Corporate Duty of Vigilance Law, 2017
Companies covered	Companies that use tantalum, tin, gold or tungsten if: the company files report with the SEC under the Exchange Act and the minerals are 'necessary to the functionality or production' of a product manufactured or contracted to be manufactured by the company.	Manufacturers and retailers doing business in California with gross receipts more than $100 million	Applies to any person or company that imports timber or timber products into Australia, or any domestic processor of Australian grown raw logs	Commercial organizations that provides goods or services and carry on business in the UK with a global net turnover of £36 million or more	French companies with 5,000 staff in France or 10,000 staff globally

Type of law	Disclosure (& implied due diligence)	Disclosure	Due Diligence + Civil Liability (fine)	Disclosure	Due diligence + Civil liability (fines + vulnerability to civil litigation)
Transparency	Publicly traded companies must submit to the SEC whether the minerals originate from the DRC or adjoining areas.	Companies must publicly disclose on their website their efforts to eradicate forced labor and human trafficking in their supply chains including: 1. Use of third party risk assessment 2. Independent supplier audits 3. Tier 1 supplier certifications 4. Internal accountability mechanisms 5. Internal training	Importers of regulated timber products must provide declarations, at the time of import, to the Customs Minister about the due diligence that they have undertaken. The Act provides for inspectors to exercise monitoring, investigation and enforcement powers.	Disclose in a statement on its websites to 'what extent, if any,' the company: 1) verifies its product supply chains; 2) audits its suppliers; 3) requires certifications from direct suppliers; 4) maintains internal accountability; and 5) trains company employees and management	The vigilance plan and its effective implementation report shall be publicly disclosed and included in the extra-financial report required for major French multinational corporations.

Type of law	Disclosure (& implied due diligence)	Disclosure	Due Diligence + Civil Liability (fine)	Disclosure	Due diligence + Civil liability (fines + vulnerability to civil litigation)
Due diligence	No requirement to conduct due diligence but if the minerals are from DRC/area then companies must describe to the SEC the due diligence measures taken to determine the source of the minerals.	None	Regulations set out detailed due diligence requirements including: information gathering; risk identification; risk assessment and risk mitigation. 2017 amendments will streamline due diligence process for timber products certified under the Forest Stewardship Council and Programme for the Endorsement of Forest Certification schemes.	None	Companies must establish and implement a due diligence plan that states the measures taken to identify and prevent the occurrence of human rights and environmental risks resulting from their activities, the activities of companies they control and the activities of sub-contractors and suppliers; actions taken to mitigate risk; and an alert mechanism.

Type of law	Disclosure (& implied due diligence)	Disclosure	Due Diligence + Civil Liability (fine)	Disclosure	Due diligence + Civil liability (fines + vulnerability to civil litigation)
Enforcement	Companies subject to liability for fraudulent or false reporting. Not liable if can prove statement made in good faith. No requirement to divest from conflict mines. The law only requires companies to report on their mineral sourcing and due diligence practices. Focus not on fines or penalties. It is designed to increase disclosure and create a 'name and shame' mechanism with the aim of transparency driving change.	Administrative order: Incomplete compliance or noncompliance with disclosure requirement may result in injunctive relief issued by the California Attorney General.	If an importer or processor intentionally, knowingly or recklessly imports or processes illegally logged timber they could face significant penalties, including up to five years imprisonment and/or heavy fines. However, there are no criminal penalties (e.g. imprisonment) that can be applied for a breach of the due diligence requirements only civil.	Administrative order: The secretary of state may seek injunction through the High Court requiring compliance.	Subject to sanctions on three grounds: if they default on commitments made in their plan; if there are faults in the plan or its implementation; or if they fail to produce a plan at all. Administrative orders, civil liability: 1. Formal notice to comply must be followed within 3 months 2. Injunction order to comply if continued noncompliance; 3. Vulnerability to civil liability claims

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